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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

V.

STATE OF TEXAS, ET AL.

BRIEF OF THE STATE OF TEXAS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Attorney General of Texas, on behalf of the State of Texas, files this Brief in Opposition to the Petition for Writ of Certiorari of the Interstate Commerce Comission ("I.C.C.").

STATEMENT

The Statement in the Petition for Writ of Certiorari previously filed by the I.C.C., other than a few portions which are clearly argument, accurately states the nature of the case, except for the statement that the State of Texas "was aware of the pendency of" Ex Parte 387, Rail Road Transportation Contracts, 367 I.C.C. 9. As was argued in the Court of Appeals, Texas had no notice that the rate contract rules were to apply to intrastate rail traffic. However, since the notice or lack thereof is not pertinent to a resolution of this case, further discussion is not necessary herein. The Court should also note that some references to citations by Petitioner are those in the petition in No. 84-1515, *I.C.C. ET AL V. TRI-STATE MOTOR TRANSIT CO., ET AL*, which the I.C.C. filed in a companion case and apparently adopts in this case.

REASONS FOR DENIAL OF THE PETITION

The Administrative Orders Review Act of 1950 (Hobbs Act) requires that a petition to directly review an I.C.C. order promulgating a rule must be filed within 60 days of the entry of the reviewable order. 28 U.S.C. §§2321 and 2342(5) (Supp. V 1982). The State of Texas recognizes that the time limitations of the statute for *direct* review of administrative orders are jurisdictional and may not be altered or enlarged by appellate review courts. *See, e.g., Chem-Haulers, Inc. v. United States*, 536 F.2d 610, 613-14 (5th Cir. 1976). The petition before the Court of Appeals however, did not ask that Court for a *direct* review of the I.C.C.'s contract rate rules promulgated November 4, 1982. In contrast, the State of Texas asked the Fifth Circuit to review the I.C.C.'s *application* of federal contract rate rules to the State of Texas' regulation of intrastate rail contract rates.

The D.C. Circuit has recognized that although a reviewing court may not have jurisdiction to review a federal administrative order because the 60-day period has expired, the reviewing court continues to have jurisdiction to review the agency's application of that order in subsequent proceedings. The court in *Functional Music, Inc. v. F.C.C.*, 274 F.2d 543 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959) acknowledged reviewing courts' jurisdictional power to review the application of administrative rules and regulations at any time:

> As applied to rules and regulations, the statutory time limit restricting judicial review of Commission action is applicable only to cut off review directly from the order promulgating a rule. It does not foreclose subsequent examination of a rule where properly brought before this court for review of further Commission action applying it. For unlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.

Although the rules in question in *Functional Music* were promulgated in 1955 and the order implementing the rules was issued

in 1958, this court found jurisdiction to review the 1958 order because the order had an immediate impact on the petitioner. The court found this jurisdiction although the validity of the order was entirely dependent upon the validity of the 1955 rules. *Id.* at 548 n.16.

Similarly, in *Network Project v. F.C.C.*, 511 F.2d 786, 789 n. 1 (D. C. Cir. 1975), the court stated that the policies adopted in a F.C.C. order, in the context of their application in subsequent cases, could be considered by a reviewing court even if the court had no jurisdiction to directly review the order under the Hobbs Act's time restraints. The court in *Network Project* allowed the petitioners to file petitions to deny private companies' applications to operate domestic satellite facilities, although these petitioners had failed to file petitions of review in the original F.C.C. proceeding which established an "open entry" rule in the area of domestic satellite operations.

These cases illustrate the Court of Appeals' jurisdiction to review the I.C.C.'s action in the present case. This proceeding marks the first possible occasion when the State of Texas could have challenged the I.C.C.'s contract rate rules and their application to the State's regulation of intrastate contract rates. This challenge did not "ripen" until this case arose; the I.C.C.'s command to the Railroad Commission of Texas ("R.C.T.") to put rail contracts into effect marked the first instance in which the I.C.C. "informed" the R.C.T. that it must adopt federal contract rate rules. To disallow review of the I.C.C.'s application of its contract rate rules to the R.C.T.'s administration of intrastate contract rates would effectively allow the I.C.C. to (a) promulgate a federal regulation that appears to apply only to federal administrative processes and then (b) magically apply that regulation to State administrative processes after the statutory period for judicial review has passed. This conduct would circumvent any State challenge of the rules either by the submission of comments or direct appeal of the final regulation. That sequence of events would subvert the precepts of administrative rule-making procedure.

The Fifth Circuit properly held that "the Hobbs Act sixty-day limit does not bar later judicial review of the substantive statutory authority for their enactment or of their applicability to a particular situation". (Petition for a Writ of Certiorari, p. 25a). Never-

theless, the I.C.C. asserts that this "procedural-substantive distinction has no support in the case law" citing *Asphalt Roofing Manufacturing Ass'n v. I.C.C.*, 567 F.2d 994, 1005 (D. C. Cir. 1977); *Seacoast Anti-Pollution League v. NRC*, 690 F.2d 1025 (D. C. Cir. 1982); and *Atchison Topeka and Sante Fe Ry. Co. v. I.C.C.*, 687 F.2d 912, 918 (7th Cir. 1982). Without burdening the Court with a detailed explanation of each of these cases, the State of Texas submits that all three deal with out-of-time, broadside attacks on the *wisdom* of a particular regulation. Any statements in those cases to the effect that the Court may not consider assertions that a rule exceeds statutory authority or that it is being misapplied by the agency, are inferential at best.

The I.C.C. also states that there is a conflict between the present cases and authorities of other circuits.[1] However, *none* of these cases deny that the "substantive v. procedural" distinction exists; in fact *Natural Resources Defense Council v. N.R.C.* and *Geller v. F.C.C. expressly acknowledge* such a dichotomy. The principal remains clear that as to *substantive* challenges to a rule, the time limit under the Hobbs Act does not apply. By representations to the contrary, the I.C.C. cannot be heard to place a 60 day "statute of limitations" on its violations of Congressional will or of its own rules. The Fifth Circuit was correct in rejecting these pleas.

Finally, the State of Texas would point out to the Court that the Court of Appeals held in favor of the I.C.C. on each and every point raised by the State below, and that the State, for reasons unrelated to the validity or invalidity of the lower court's decision, has declined to petition this court for writ of certiorari. Although the I.C.C. has cited certain cases[2] wherein a prevailing party has sought and been granted certiorari, none involves the situation herein where the true prevailing party in the Court of

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1. *Natural Resources Defense Council v. N.R.C.*, 666 F.2d 595 (D. C. Cir. 1981); *Geller v. F.C.C.*, 610 F.2d 973 (D. C. Cir. 1979); *New York v. United States*, 568 F.2d 887 (2nd Cir. 1977); *Chem-Haulers, Inc. v. United States, 536 F.2d 610 (5th Cir. 1976)*; *Micro Wave Communications, Inc. v. F.C.C.*, 515 F.2d 385 (D. C. Cir. 1974).

2. *Florida Power & Light Company v. Lorion*, 53 U.S.L.W. 4360 (1985); *Director, OWC v. Perini North River Associates*, 459 U.S. 297 (1983); *Harrison v. P.P.G. Industries, Inc.*, 446 U.S. 578 (1980); *United States v. Nixon*, 418 U.S. 683 (1974); *Menominee Tribe of Indian v. United States*, 391 U.S. 404 (1968).

Appeals sought certiorari alone (not by cross-petition). In short, the I.C.C. is appealing the affirmance of its own order, when it could *not* have appealed its own order to the Fifth Circuit in the first place. The State of Texas would submit that the I.C.C. is seeking an advisory opinion, in which this court should not indulge. *Princeton University v. Schmid*, 445 U.S. 100, 102-103 (1982); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 733-735 (1978).

CONCLUSION

The State of Texas prays that the Petition for Writ of Certiorari be denied.

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